SUPREME COURT, U. S.

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No. 889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HARRY A. SMITH, JR.,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Harry A. Smith, Jr., prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Illinois in denying his Petition for Leave to Appeal from the decision of the Appellate Court of Illinois, First District, affirming his conviction in the Circuit Court of Cook County finding him guilty of the offense of an attempt with intent of committing murder and sentencing him to a term of one to fifteen years in the penitentiary.

HEREIN BELOW

The opinion of the Appellate Court of Illinois, First District is reported at 71 Ill. App. 2d 446, 219 N.E. 2d 82 (1966), and is printed in this petition as Appendix A.

Petition for Leave to Appeal to the Supreme Court of Illinois was denied on September 22, 1966 without opinion.

JURISDICTION OF THIS COURT

1. The date of judgment sought to be reviewed was entered by the Supreme Court of Illinois on September 22, 1966, when Petition for Leave to Appeal was denied. (R. 16). This petition for Writ of Certiorari is filed within ninety (90) days from said denial.

2. The jurisdiction of this court is invoked under Title 28, U.S. Code, Section 1257.

3. A Rule 22 (1) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. May an inconsistent verdict rendered by a trial judge hearing a case without a jury based on the same set of facts be permitted to stand? Is it not a deprivation of due process of law under the Fourteenth Amendment to the Constitution of the United States for a Court to find a defendant not guilty on one count of an indictment, and guilty of another count where the charges arise out of the same set of facts and the same evidence is sought by the State to justify the verdict of guilty?

STATEMENT OF THE CASE

During a trial before a judge, the jury having been waived, the trial judge found the defendant guilty of an attempt with intent to commit murder (A. 1). The same judge found the defendant not guilty of assaulting the victim. Illinois has a statute (Section 8-4, Chap. 38, Ill. Rev. Stats. 1963, which defines "attempt" as follows:

> "a person commits an attempt when, with intent to commit a specific offense, he does in fact which constitutes a sustained step toward the commission of that offense."

The petitioner was found guilty of attempted murder under the following facts:

A 21 year old young lady was walking to her home at about 7:00 P.M. on March 28, 1963. She heard footsteps behind her, turned and greeted the person, who returned the greeting. The man then threw a belt around her neck, half standing and half falling for about half a block. She couldn't breathe. The belt then broke and she said, "please don't". The man then ran away. (A. 4-5). The whole occurrence was over in a few seconds. She went to work the next day and did not see a doctor, nor have any medical attention. (A. 5).

The petitioner confessed, stating that when he saw her and when he was close to her "vaguely remembered putting his belt around her head and started to pull her up the street until he heard her say, "please don't". At that time, "I suddenly remembered what I was doing and I dropped her and the belt and started running back towards the car." (A. 10).

REASONS FOR GRANTING THE WRIT

The Court has never decided whether an inconsistent verdict may be sustained when such verdict is rendered by a Court sitting without a jury.

Although this Court has spoken in affirming convictions based on inconsistent verdicts when such verdicts are rendered by juries (*Andres* v. *United States,* 333 U.S. 740, *United States* v. *Dotterweich,* 320 U.S. 277 and *Dunn* v. *United States,* 284 U.S. 390, this court has never spoken on the question as presented herein.

The only case which bears upon the question is *United States* v. *Maybury,* 2 Cir., 274 F. 2d 899, which delineates the history of the law on inconsistent verdicts and pointed out the differences between inconsistent verdicts as rendered by the juries and those by trial judges sitting without juries. *Maybury* stated, p. 903:

> "While the historic decision of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country' even when he sits in the jury's place. If he deems an multiplicious, he has only to say so, and the time for him to exercise any 'levity' that he deems warranted is on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts . . . we do not believe we would enhance respect for law or for the Courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that for historic reasons, has been granted the jury . . . We know the rule of logic in law is not unlimited; but 'Holmes did not tell us that logic is

to be ignored when experience is silent'. (Cardozo, the Nature of Judicial Process, 33). Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail."

CONCLUSION.

Because this important question has never been decided by this Court, we pray that certiorari may be granted to determine whether a judge sitting without a jury may render inconsistent verdicts.

Respectfully submitted,

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